2009

Thad Stevens v. Fillmore City : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS
FOR THE STATE OF UTAH

THAD STEVENS, Appellant, -vs- FILLMORE CITY, Appellee.	**BRIEF OF APPELLEE** Appellate Case No. 20090568

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JURISDICTION

This is an appeal from a final order from the Fourth Judicial District Court, Millard County, State of Utah. This court has jurisdiction over the appeal pursuant to Rule 3 of the Utah Rules of Appellate Procedure.

STATEMENT OF THE ISSUES ON APPEAL AND STANDARDS OF APPELLATE REVIEW

1. Is the Board of Adjustment's finding that Appellant's carport is a "structure" under the definition of that term arbitrary, capricious or illegal?

As the district court's review was limited to the record before the Board of Adjustment, this court should review the appeal "just as if the appeal had come directly from the agency." Wells v. Board of Adjustment, 936 P.2d 1102, 1104 (Utah Ct. App. 1997). However, municipal land use decisions are generally entitled to "substantial deference." Patterson v. Utah County Bd. Of Adjustment, 893 P.2d 602, 603-04 (Utah Ct. App. 1995). Accordingly, the Board's decisions should be "given a strong presumption of validity." Id.

2. Based upon evidence presented at the hearing before the Board of Adjustment, is Appellant entitled to a variance?

As the district court's review was limited to the record before the Board of Adjustment, this court should review the appeal "just as if the appeal had come directly from the agency." Wells v. Board of Adjustment, 936 P.2d 1102, 1104 (Utah Ct. App. 1997). However, municipal land use decisions are generally entitled to "substantial deference." Patterson v. Utah County Bd. Of Adjustment, 893 P.2d 602, 603-04 (Utah Ct. App. 1995). Accordingly, the Board's decisions should be "given a strong presumption of validity." Id.

3. Where Appellant was afforded the opportunity to present evidence and argument before the Board of Adjustment regarding his request for a variance, and where the district court was provided with a complete transcript of the Board's proceedings, was the district court's exclusion of additional evidence in support of a variance appropriate?

This court should review the district court's decision to exclude additional evidence for correctness. See Davis County v. Clearfield City, 756 P.2d 704, 710 (Utah Ct. App. 1988).

4. Was the district court's decision to limit review of Appellant's appeal to the record a denial of Appellant's due process?

This court should review the district court's decision for correctness. See Davis County v. Clearfield City, 756 P.2d 704, 710 (Utah Ct. App. 1988).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

1. Pertinent constitutional provisions, statutes and rules are in Addendum 1 to

this brief.

STATEMENT OF THE CASE

Appellant constructed a carport with a metal roof on his property in violation of the Fillmore City Municipal Code in that it encroached on the lot setback requirement. After being served with notice of the violation, Appellant filed an appeal with the Fillmore City Board of Adjustment arguing that the carport was not in violation of the setback requirement as it was not a "structure" under the definition of that term in the Municipal Code and that, alternatively, he was entitled to a variance. Following a hearing, at which Appellant was provided an opportunity to present evidence and argument, the Board determined that the carport was a "structure" and, therefore, violated the setback requirement. The Board also voted to deny the Appellant's request for a variance.

Appellant filed a Petition for Judicial Review of the Board's decision in the district court. At a hearing on Appellant's petition, the court instructed the parties to prepare memoranda on the issues before it. Appellant filed a memorandum of law and Appellee filed an opposing memorandum. Appellant subsequently filed a reply memorandum. The court found the Board's interpretation of the definition of a structure was reasonable, and therefore not arbitrary, capricious or illegal. The court also found that Appellant had not established that he was entitled to a variance. The court limited its review of the issues to the record provided to it and denied Appellant's request to present new evidence at a hearing on appeal.

Appellant filed a notice of appeal with the Supreme Court, which was subsequently

transferred to this Court.

STATEMENT OF FACTS

The Appellant constructed a carport with a metal roof on his property located in Fillmore City sometime prior to April, 2008 (R. 18: 25-28). Appellant installed the carport to protect his vehicle from the elements (R. 19: 79-82). On or about April 16, 2008, Appellant was served with a notice of violation of the Fillmore City zoning ordinance as the carport did not meet the lot setback requirements of Fillmore City Municipal Code ("Municipal Code") § 6-7-8.3 (R. 2).

Appellant appealed the decision of the planning and zoning administrator and requested a hearing before the Fillmore City Board of Adjustment ("the Board"), which was held on or about July 31, 2008 (R. 18). At the hearing, Appellant argued that the carport is not a "structure" under the definition of that term in the Municipal Code and is, therefore, not in violation of the setback requirement (R. 18-19: 23-65). Appellant's argument centered around an assertion that because the carport was not "impervious" or completely enclosed, it does not fall under the definition of "structure" (R. 19: 44-65). The Board determined that the carport was a structure in that it was constructed of an impervious material, i.e. metal, and was, therefore, in violation of the setback requirement (R. 28-29: 482-490).

Appellant next argued that he was entitled to a variance. Appellant addressed the requirements for a variance found in Utah Code Annotated § 10-9a-702 and argued that the carport satisfied the statute (R. 19-20: 67-110). The Board reviewed the requirements for a variance and applied them to the facts before it and voted to deny the variance (R. 23-24: 239-

306; 26-28: 392-464).

On or about August 27, 2008, Appellant filed a Petition for Judicial Review with the Fourth Judicial District Court, Millard County, State of Utah, alleging that the Board erred in its interpretation of the word "structure" and that he was entitled to a variance (R. 1-7.).

On or about April 13, 2009, the district court held a hearing on the Appellant's Petition for Judicial Review (R. 36). At the hearing, the court instructed the parties to prepare memoranda on the matter, after which Appellant filed a memorandum, Appellee filed an response and Appellant filed a reply memorandum (R. 37, 46, 56).

In his memorandum, Appellant alleged that the Board's interpretation of structure was arbitrary, capricious or illegal (R. 37). He also argued that he was not provided an opportunity to present evidence or argument regarding his request for a variance before the Board, or alternatively, the Board improperly excluded evidence, and therefore, he should be allowed to present new evidence on the issue of a variance before the district court. (Id.)

On or about June 22, 2009, the district court entered a ruling affirming the Board's interpretation of structure as a reasonable interpretation, and therefore, not arbitrary, capricious or illegal (R. 66). The court also determined that Appellant was not entitled to a variance as he did not provide evidence that the carport satisfied the requirements set out in the statute (R. 66-67). Additionally, the court found that Appellant was not entitled to present additional evidence on the issue of a variance as he was provided significant time and opportunity to present evidence and argument on the issue before the Board (R. 67-68).

SUMMARY OF ARGUMENTS

Appellant constructed a carport on his property in violation of the Fillmore City Municipal Code ("Municipal Code"). The carport violates the Code in that it does not meet the lot setback requirements of Code Section 6-7-8.3 as it is not set back 25 feet from the front property line. In his Brief of the Appellant ("Appellant's Brief"), Appellant argues that the carport is not a "structure" under the definition of that term in the Municipal Code, and therefore, is not subject to the 25 foot setback requirement. However, substantial evidence presented at a hearing before the Fillmore City Board of Adjustment ("the Board"), supported a finding that because the carport is fixed to the ground, made of metal, which is an impervious material, and was built for the protection of Appellant's vehicle from the elements, it qualifies as a "structure" under the definition of that term. Because the Board's findings were not arbitrary, capricious or illegal, they should be upheld by this Court.

Appellant argues that even if the carport satisfies the definition of "structure", and is therefore in violation of the Municipal Code, he is entitled to a variance. The requirements for a variance are clearly set forth in Utah Code Annotated Section 10-9a-702 and are mirrored in Municipal Code Section 6-5-6. The appeal authority may grant a variance only if each of the requirements are satisfied. See U.C.A. § 10-9a-702(2)(a). At the hearing before the Board, Appellant requested a variance but failed to introduce evidence establishing that the carport satisfied any of the requirements provided under the statute. The Board considered each of the requirements and reasonably concluded that the evidence presented did not support a finding that

a variance should be granted. Accordingly, Appellant's argument that he is entitled to a variance fails.

Finally, Appellant's argument that he was denied due process fails because he was afforded significant time and opportunity to present evidence and argument at the administrative level. Utah law provides property owners the opportunity to appeal a decision from a land use authority to an appeal authority. Upon timely request, property owners are afforded a hearing before the appeal authority at which time they are given the opportunity to present evidence in support of their position. Additionally, Section 10-9a-801of the Utah Code Annotated provides that district court review of the Board's decision is limited to the record provided by the Board unless the court determines that evidence was improperly excluded by the Board. In the present case, Appellant requested and received a hearing before the Fillmore City Board of Adjustment ("the Board") at which time he, through counsel, presented evidence and argument regarding his position that the carport is not a structure under the Municipal Code's definition and that, alternatively, he was entitled to a variance. Because the district court was provided with a record of the hearing before the Board and there is no evidence that the Board improperly excluded evidence submitted by Appellant, Appellant's request to introduce new evidence before the district court should be denied.

ARGUMENT

I. THE BOARD'S DETERMINATION THAT APPELLANT'S CARPORT IS A STRUCTURE AS DEFINED IN THE MUNICIPAL CODE IS REASONABLE AND IS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

Substantial evidence presented at a hearing before the Board supported the Board's reasonable determination that the Appellant's carport is a "structure" as defined in the Municipal Code. Section 10-9a-801 of the Utah Code Annotated provides the district court's standard of review of a Board of Adjustment's decision. See U.C.A. § 10-9a-801 (Supp. 2007). The statute provides that "[a] final decision of a land use authority or an appeal authority is valid if the decision is supported by substantial evidence in the record and is not arbitrary, capricious, or illegal." Id. at § 10-9a-801(3)(c). Indeed, the Supreme Court has made clear that a district court may find a decision of a Board of Adjustment arbitrary or capricious only if the decision was "so unreasonable" as to be labeled as such. See Xanthos v. Board of Adjustment of Salt Lake City, 685 P.2d 1032, 1035 (1984). Additionally, when an administrative board's decision is challenged on appeal, "the Board's actions are generally accorded substantial deference, if exercised within the boundaries established by statute." See Wells v. Board of Adjustment, 936 P.2d 1102, 1104 (Utah Ct. App. 1997) citing Patterson v. Utah County Bd. of Adjustment, 893 P.2d 602, 603-04 (Utah Ct. App. 1995) (stating that within boundaries established by statute, the Board is generally afforded broad discretion and its decisions given a strong presumption of validity).

In the present case, the Board correctly applied the relevant definitions found within the Municipal Code to the evidence presented by Appellant and made a reasonable determination that the carport is a structure.

Structure is defined in the Municipal Code as "[a]nything constructed, the use of which

requires a fixed location on or in the ground, or attached to something having a fixed location on the ground and which imposes an impervious material on or above the ground." The definition also includes a "building." See Fillmore City Municipal Code, § 6-2. The word "building" is defined as "[a]ny structure, whether temporary or permanent, having a roof, and used or built for the shelter or enclosure of persons, animals, possessions, or property of any kind". See Municipal Code § 6-2.

Counsel for Appellant concedes that the carport satisfies the first part of the definition of structure in that it is fixed to the ground. See Brief of the Appellant at p. 10. Appellant argues, nonetheless, that because the carport is not completely enclosed and allows "entrance or passage", it is not impervious, and therefore, not a structure under the second part of the definition. See Br. of Aplt. at p.10.

The definition of structure does not require that the thing being constructed be made completely impervious, or impenetrable, in order to qualify as a structure. Indeed, it is instructive that the definition uses the terms "impervious *material*" (emphasis added). At the hearing before the Board, Appellant described the carport as being a "metal shade" (R. 18: 32.) or "metal umbrella." (R. 19: 52.) The Board, in its decision, reasonably concluded that because the carport imposes an impervious material, i.e. metal, on or above the ground, it falls within the definition of the word "structure."

Moreover, the definition of structure includes a "building" as defined in the Code. See Municipal Code § 6-2. Appellant concedes that the purpose of the carport is to "protect the

vehicles he parks under the covering from the weather and other natural elements." See Br. of Aplt. at p. 9. Appellant's own description of the carport falls squarely within the definition of a building, as it has a roof and is "used or built for the shelter or enclosure of persons, animals, possessions, or property of any kind." See Municipal Code § 6-2. Accordingly, the carport qualifies as a structure under the definition of that word in the Municipal Code.

II. THE EVIDENCE APPELLANT PRESENTED BEFORE THE BOARD OF ADJUSTMENT FAILED TO SATISFY THE REQUIREMENTS FOR A VARIANCE.

Appellant argues that even if the carport falls within the definition of a structure under the Municipal Code and is, therefore, in violation of the setback requirement, he is nevertheless entitled to a variance. Appellant requested a variance at the hearing before the Board but failed to present sufficient evidence to establish that he was entitled to a variance.

The requirements for a variance are set out in Utah Code Annotated § 10-9a-702:

> (2)(a) The appeal authority may grant a variance only if:
> (i) literal enforcement of the ordinance
> would cause an unreasonable hardship for the applicant that is not necessary to carry out the general purpose of the land use ordinances;
> (ii) there are special circumstances attached
> to the property that do not generally apply to other properties in the same zone;
> (iii) granting the variance is essential to the enjoyment of a substantial property right possessed by other property in the same zone;
> (iv) the variance will not substantially affect the general plan and will not be contrary to the public interest; and
> (v) the spirit of the land use ordinance is
> observed and substantial justice done.

The above requirements are also set out in § 6-5-6 of the Municipal Code.

A review of the record shows that the Board considered each of the requirements for a variance, applied those requirements to the evidence presented by Appellant and reasonably concluded that none of the requirements had been satisfied (R. 23-24: 239-306; 26-28: 392-464).

First, the Board determined that the 25 foot setback requirement was adopted to further the health, safety and welfare of the community. (R. 23: 247-252). The Board determined that allowing the carport to encroach on the setback would not satisfy the first requirement absent a finding of unreasonable hardship by Appellant (Id.).

Second, the Board determined that there are no special circumstances attached to the property (R. 27: 404-408). In Xanthos v. Board of Adjustment of Salt Lake City, P.2d 1032, 1036 (1984), the Utah Supreme Court held that in order to satisfy this requirement, a property owner must show "that the property itself contains some special circumstance that relates to the hardship complained of and that granting the variance to take this into account would not substantially affect the zoning plan." Appellant failed to present such evidence. In fact, the only evidence Appellant presented to support a finding of special circumstances is an assertion that the way the property has been developed somehow makes it unique, which conflicts with the Court's interpretation of special circumstances in Xanthos (R. 26: 364-369).

Third, the Board determined that a denial of the variance would not deprive Appellant of privileges possessed by other property owner's in the same zone (R. 27: 423-437). Indeed, the Chairman of the Board noted that if the variance were granted, the Board would have to allow everyone in the zone the same privilege (R. 24: 282-285).

Fourth, the Board found that the setback requirement is in the public interest (R. 24: 288-294). The Board noted both aesthetic and safety reasons to support a denial of the variance.

Finally, the Board determined that Appellant failed to establish that the fifth requirement of the statute had been satisfied in that Appellant either knew or should have known the requirements of the Fillmore City zoning laws (R. 24: 296-306).

Because the Board reasonably concluded that Appellant failed to present sufficient evidence to satisfy the requirements for a variance, the Board's decision should be upheld.

III. APPELLANT WAS AFFORDED SUFFICIENT OPPORTUNITY TO PRESENT EVIDENCE AND MAKE ARGUMENT BEFORE THE BOARD REGARDING HIS REQUEST FOR A VARIANCE AND IS, THEREFORE, BARRED FROM PRESENTING ADDITIONAL EVIDENCE REGARDING THE ISSUE BEFORE THE DISTRICT COURT.

During the hearing before the Board, Appellant was provided sufficient opportunity to present evidence and make argument regarding his request for a variance. Upon appeal, the district court was provided with a true and correct transcript of the recording of the hearing before the Board. Accordingly, district court review of the Board's decision is limited to the record provided to the court.

Section 10-9a-801 of the Utah Code Annotated provides the procedure for district court review of an appeal authority's land use decision. The law requires that the appeal authority "shall transmit to the reviewing court the record of its proceedings, including its minutes, findings, orders, and, if available, a true and correct transcript of its proceedings." Utah Code Ann. § 10-9a-801(7)(b) (2007). The statute also provides that "[i]f there is a record, the district

court's review is limited to the record provided by the land use authority or appeal authority" and that "[t]he court may not accept or consider any evidence outside the record of the land use authority or appeal authority . . . unless that evidence was offered to the land use authority or appeal authority, respectively, and the court determines that it was improperly excluded." See Utah Code Ann. § 10-9a-801(a)(I), (ii) (2007).

In his Brief, Appellant argues that he was denied the opportunity to introduce evidence to the Board regarding a variance and evidence was improperly excluded by the Board, and therefore, he is entitled to present such evidence before the district court on appeal. A review of the Transcript of the Proceedings, however, reveals that Appellant was afforded ample opportunity to present evidence and argument to the Board. Indeed, members of the Board were silent while Appellant took a significant amount of time at the beginning of the hearing to present his case (R. 18-20: 23-110). The Board remained silent until Appellant asked whether any of the members had questions (R. 20: 110). Appellant addressed the issue of a variance and made argument as to why he was entitled to one (R. 19: 67-99). After the Board addressed each of the requirements for a variance, Appellant was again provided an opportunity to address the Board's comments, answer questions raised by the Board and make additional argument prior to the Board's vote on the issue (R. 25-26: 329-386). Moreover, there is no evidence in the record that the Board improperly excluded evidence which was offered by Appellant. Accordingly, the district court's review of the Board's decision in limited to the record provided to the court. See Ralph L. Wadsworth Construction. Inc., v. West Jordan City, 2000 UT App. 49, 999 P.2d 1240

(holding that appellate review of a municipality's land use decision is limited to determining whether the decision was arbitrary, capricious, or illegal) and Wells v. Board of Adjustment, 936 P.2d 1102 (Utah Ct. App. 1997) (holding that the district court's use of summary judgment to dispose of a petition to review a decision to grant a variance by the Board of Adjustment was appropriate because the district court's review of the board's decision was limited to the facts before the board).

IV. APPELLANT WAS PROVIDED DUE PROCESS AT THE ADMINISTRATIVE LEVEL, AND ACCORDINGLY, THE DISTRICT COURT'S DECISION TO EXCLUDE ADDITIONAL EVIDENCE WAS APPROPRIATE.

At the administrative level, due process requires only that a hearing be conducted at which an applicant is given the opportunity to present "evidence and contentions." See Peatross v. Board of Commissioners, 555 P.2d 283 (Utah 1976). Additionally, the Court in Peatross declared that:

> The standard rule is that appellate jurisdiction is the authority to review the actions or judgments of an inferior tribunal, and to affirm, modify or reverse such action or judgment. Correlated to this is the principle that ordinarily, where the lower tribunal, acting within the scope of its authority, has conducted a hearing and arrived at a decision, the reviewing court will examine only the certified record; and will not interfere with matters of discretion or upset the actions of the lower tribunal except upon a showing that the tribunal acted in excess of its authority or in a manner so clearly outside reason that its action must be deemed capricious and arbitrary.

Id. at 284.

Applying the above principle, the Board conducted a hearing at which Appellant was provided the opportunity to present evidence and argument. There is no evidence that the Board improperly excluded evidence presented by Appellate. The district court was provided with a

transcript of the proceeding before the Board and correctly based its decision solely on the record. Accordingly, Appellate was not deprived of his right to due process.

CONCLUSION

Appellant's carport is in violation of the Municipal Code in that it falls squarely under the Municipal Code's definition of a structure, as it, according to Appellant, is constructed from an impervious material and its purpose is to protect his vehicle from the elements. Additionally, Appellant does not qualify for a variance as he is unable to establish that the requirements under the statute have been satisfied. Finally, district court review of the Board's decision is limited to the record that has been provided to the court as Appellant was provided an opportunity to present evidence and argument before the Board and there is no evidence that the Board improperly excluded evidence offered by the Appellant.

RESPECTFULLY submitted this 23rd day of December, 2009.

KAELA P. JACKSON
Fillmore City Attorney

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Brief of Appellee were mailed first-class, postage prepaid, to James K. Slavens, attorney for Appellant, P.O. Box 752, Fillmore, Utah 84631, this 23rd day of December, 2009.

ADDENDUM 1
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

United States Constitution, Amendment XIV Section 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

10-9a-702. Variances.

(1) Any person or entity desiring a waiver or modification of the requirements of a land use ordinance as applied to a parcel of property that he owns, leases, or in which he holds some other beneficial interest may apply to the applicable appeal authority for a variance from the terms of the ordinance.

(2) (a) The appeal authority may grant a variance only if:

(i) literal enforcement of the ordinance would cause an unreasonable hardship for the applicant that is not necessary to carry out the general purpose of the land use ordinances;

(ii) there are special circumstances attached to the property that do not generally apply to other properties in the same zone;

(iii) granting the variance is essential to the enjoyment of a substantial property right possessed by other property in the same zone;

(iv) the variance will not substantially affect the general plan and will not be contrary to the public interest; and

(v) the spirit of the land use ordinance is observed and substantial justice done.

(b) (i) In determining whether or not enforcement of the land use ordinance would cause unreasonable hardship under Subsection (2)(a), the appeal authority may not find an unreasonable hardship unless the alleged hardship:

(A) is located on or associated with the property for which the variance is sought; and

(B) comes from circumstances peculiar to the property, not from conditions that are general to the neighborhood.

(ii) In determining whether or not enforcement of the land use ordinance would cause unreasonable hardship under Subsection (2)(a), the appeal authority may not find an unreasonable hardship if the hardship is self-imposed or economic.

(c) In determining whether or not there are special circumstances attached to the property under Subsection (2)(a), the appeal authority may find that special circumstances exist only if the special circumstances:

(i) relate to the hardship complained of; and

(ii) deprive the property of privileges granted to other properties in the same zone.

(3) The applicant shall bear the burden of proving that all of the conditions justifying a variance have been met.

(4) Variances run with the land.

(5) The appeal authority may not grant a use variance.

(6) In granting a variance, the appeal authority may impose additional requirements on the applicant that will:

(a) mitigate any harmful affects of the variance; or

(b) serve the purpose of the standard or requirement that is waived or modified.

History: C. 1953, 10-9-707, enacted by L. 1991, ch. 235, § 39; 1992, ch. 23, § 19; renumbered by L. 2005, ch. 254, § 62.

Amendment Notes. - The 2005 amendment, effective May 2, 2005, renumbered this section, which formerly appeared as § 10-9-707; substituted "a land use ordinance" for "the zoning ordinance" in Subsection (1) and "appeal authority" for "board of adjustment" and "zone" for "district" wherever they appeared in the section; and made minor stylistic changes.

NOTES TO DECISIONS

Analysis

Authority of city council.

An ordinance making the city council, rather than the Board of Adjustment, the decision-making authority with regard to the granting of variances, and making the statutory 30-day appeal period nearly impossible to meet by requiring that the variance applicant seek approval from the planning commission and the city council, violated former § 10-9-12. Chambers v. Smithfield City, 714 P.2d 1133 (Utah 1986).

10-9a-801. No district court review until administrative remedies exhausted - Time for filing - Tolling of time - Standards governing court review - Record on review - Staying of decision.

(1) No person may challenge in district court a municipality's land use decision made under this chapter, or under a regulation made under authority of this chapter, until that person has exhausted the person's administrative remedies as provided in Part 7, Appeal Authority and Variances, if applicable.

(2) (a) Any person adversely affected by a final decision made in the exercise of or in violation of the provisions of this chapter may file a petition for review of the decision with the district court within 30 days after the local land use decision is final.

(b) (i) The time under Subsection (2)(a) to file a petition is tolled from the date a property owner files a request for arbitration of a constitutional taking issue with the property rights ombudsman under Section 13-43-204 until 30 days after:

(A) the arbitrator issues a final award; or

(B) the property rights ombudsman issues a written statement under Subsection 13-43-204(3)(b) declining to arbitrate or to appoint an arbitrator.

(ii) A tolling under Subsection (2)(b)(i) operates only as to the specific constitutional taking issue that is the subject of the request for arbitration filed with the property rights ombudsman by a property owner.

(iii) A request for arbitration filed with the property rights ombudsman after the time under Subsection (2)(a) to file a petition has expired does not affect the time to file a petition.

(3) (a) The courts shall:

(i) presume that a decision, ordinance, or regulation made under the authority of this chapter is valid; and

(ii) determine only whether or not the decision, ordinance, or regulation is arbitrary, capricious, or illegal.

(b) A decision, ordinance, or regulation involving the exercise of legislative discretion is valid if it is reasonably debatable that the decision, ordinance, or regulation promotes the purposes of this chapter and is not otherwise illegal.

(c) A final decision of a land use authority or an appeal authority is valid if the decision is supported by substantial evidence in the record and is not arbitrary, capricious, or illegal.

(d) A determination of illegality requires a determination that the decision, ordinance, or regulation violates a law, statute, or ordinance in effect at the time the decision was made or the ordinance or regulation adopted.

(4) The provisions of Subsection (2)(a) apply from the date on which the municipality takes final action on a land use application for any adversely affected third party, if the municipality conformed with the notice provisions of Part 2, Notice, or for any person who had actual notice of the pending decision.

(5) If the municipality has complied with Section 10-9a-205, a challenge to the enactment of a land use ordinance or general plan may not be filed with the district court more than 30 days after the enactment.

(6) The petition is barred unless it is filed within 30 days after the appeal authority's decision is final.

(7) (a) The land use authority or appeal authority, as the case may be, shall transmit to the reviewing court the record of its proceedings, including its minutes, findings, orders, and, if available, a true and correct transcript of its proceedings.

(b) If the proceeding was tape recorded, a transcript of that tape recording is a true and correct transcript for purposes of this Subsection (7).

(8) (a) (i) If there is a record, the district court's review is limited to the record provided by the land use authority or appeal authority, as the case may be.

(ii) The court may not accept or consider any evidence outside the record of the land use authority or appeal authority, as the case may be, unless that evidence was offered to the land use authority or appeal authority, respectively, and the court determines that it was improperly excluded.

(b) If there is no record, the court may call witnesses and take evidence.

(9) (a) The filing of a petition does not stay the decision of the land use authority or authority appeal authority, as the case may be.

(b) (i) Before filing a petition under this section or a request for mediation or arbitration of a constitutional taking issue under Section 13-43-204, the aggrieved party may petition the appeal authority to stay its decision.

(ii) Upon receipt of a petition to stay, the appeal authority may order its decision stayed pending district court review if the appeal authority finds it to be in the best interest of the municipality.

(iii) After a petition is filed under this section or a request for mediation or arbitration of a

constitutional taking issue is filed under Section 13-43-204, the petitioner may seek an injunction staying the appeal authority's decision.

History: C. 1953, 10-9-1001, enacted by L. 1991, ch. 235, § 53; 1992, ch. 30, § 13; 1999, ch. 291, § 3; 2003, ch. 124, § 3; 2004, ch. 223, § 2; renumbered by L. 2005, ch. 254, § 69; 2007, ch. 306, § 7; 2007, ch. 363, § 4.

Amendment Notes. - The 2003 amendment, effective May 5, 2003, added "or in violation of" in Subsection (2)(a).

The 2004 amendment, effective May 3, 2004, substituted "property rights" for "private property" throughout Subsection (2)(b) and made stylistic changes.

The 2005 amendment, effective May 2, 2005, renumbered this section, which formerly appeared as § 10-9-1001; added "as provided in Part 7, Appeal Authority and Variances, if applicable" in Subsection (1); in Subsection (2)(a), substituted "a final decision" for "any decision" and "local land use decision is final" for "local land use decision is rendered"; substituted "a decision, ordinance, or regulation made under the authority of this chapter is valid" for "land use decisions and regulations are valid" in Subsection (3)(a)(i); added "ordinance, or regulation" in Subsection (3)(a)(ii); added Subsections (3)(b)-(9); and made stylistic changes.

The 2007 amendment by ch. 306, effective April 30, 2007, substituted "Subsection 13-43-204(3)(b)" for "Subsection 63-34-13(4)" in Subsection (2)(b)(i)(B) and substituted "Section 13-43-204" for "Section 63-34-13" throughout the section.

The 2007 amendment by ch. 363, effective April 30, 2007, substituted the language beginning "if it is reasonably debatable" for "if the decision, ordinance, or regulation is reasonably debatable and not illegal" in Subsection (3)(b).

This section has been reconciled by the Office of Legislative Research and General Counsel.

NOTES TO DECISIONS

Analysis

lubricants, at which the customer provides the service to his own vehicle, and at which no vehicle repair or maintenance service is offered. Such an establishment may offer for sale at retail other convenience items as a clearly secondary activity. Stations located at interstate exchanges catering to semi-trucks, which also include accommodations for truckers, also known as truck stops, require a conditional use permit.

Automotive Service Station. An establishment whose primary purpose is the retail sale of gasoline or other motor vehicle and related fuel, oil, or lubricant. Secondary activities may include minor automotive repair, maintenance, or automatic car wash.

Aviation Airport Services. Area containing an aviation landing strip, runway, hanger or other related services needed for aircraft.

Balcony. A platform that projects from the wall of a Building and is enclosed by a railing, parapet or balustrade.

Banking or Financial Service. A bank, credit union, savings and loan association, or other establishment with a primary purpose of receiving, lending, exchanging, or safeguarding money, or performing financial advisory service. This definition shall include outside drive-up facilities for service to customers in automobiles.

Bar, Tavern, Lounge, and Club. An establishment intended primarily for the on-premises sale and consumption of alcoholic beverages, open either to the public or operated as a nonprofit private club for members only.

Basement. A story whose floor is more than 12 inches below the average level of the adjoining ground, but where no more than half of its floor-to-ceiling height is below the average contact level of the adjoining ground. A basement shall be counted as a story for purposes of height measurement and as a half-story for purposes of side-yard determination.

Bed and Breakfast. A building where, for compensation, meals and lodging are provided for at least five but not more than 15 persons.

Board of Adjustment. A five (5) member board appointed by the Fillmore City Council as provided in this ordinance.

Bond, Public Improvement. A one (1) year guarantee to the City that all public improvements have been installed to City specifications and will operate properly.

Building. Any structure, whether temporary or permanent, having a roof, and used or built for the shelter or enclosure of persons, animals, possessions, or property of any kind.

Chapter 6-2 – DEFINITIONS

Street, Private. A right-of-way or easement in private ownership, not dedicated or maintained as a public street, which affords the principal means of access to two or more lots.

Street, Public. A street that has been dedicated to and accepted by the City Council; that the City has acquired and accepted by prescriptive right; or that the City owns in fee. A public thoroughfare, which affords principal, means of access to abutting property and has a right-of-way that exceeds 26 feet in width. The term street shall include avenue, drive, circle, road, parkway, boulevard, highway, thoroughfare, or any other similar term.

Street, Subcollector. A street which conveys traffic to more dwellings and includes through traffic between access streets and collectors. Usual ADT range is 250-1,000 vehicles.

Streetscape. The distinguishing characteristics of a particular street including paving materials, adjacent space on both sides of the street, landscaping, retaining walls, sidewalks, building facades, lighting, medians, street furniture and signs.

Structure. Anything constructed, the use of which requires a fixed location on or in the ground, or attached to something having a fixed location on the ground and which imposes an impervious material on or above the ground; definition includes "Building".

Structure, Pre-existing. A structure, which was legally constructed prior to (date of adoption).

Structural Alterations. Any change in the supporting members of a building, such as bearing walls, columns, beams, or girders.

Subdivision. Any land, vacant or improved, which is divided or proposed to be divided into two (2) or more Lots, Parcels, Site, Units, plots, or other division of land for the purpose, whether immediate or future, for offer, sale, lease, or Development, either on the installment plan or upon any and all other residential and nonresidential zoned land, whether by deed, metes and bounds description, devise and testacy, lease, map, plat, or other recorded instrument.

1.2 "Subdivision" does not include:

A. A bona fide division or partition of agricultural land for the purpose of joining one of the resulting separate parcels to a contiguous parcel of unsubdivided agricultural land, if neither the resulting combined parcel nor the parcel remaining from the division or partition violates an applicable zoning ordinance;

B. A recorded agreement between owners of adjoining properties adjusting their mutual boundary if:

1. No new lot is created; and
2. The adjustment does not result in a violation of applicable zoning ordinances; or

5. Proceedings and hearings before the Board of Adjustment shall be had pursuant to rules adopted by the Board of Adjustment and in conformance with general principles of due process. Any party in interest may appear at such hearing in person, by agent, or by an attorney of his/her choice.

6. The person or entity making the appeal has the burden of proving that an error has been made.

B. 1. Only decisions applying the zoning ordinance may be appealed to the Board of Adjustment.

2. A person may not appeal, and the Board of Adjustment may not consider, any zoning ordinance amendments.

3. The City Council shall hear and decide appeals from Planning Commission decisions regarding conditional use permits.

C. Appeals may not be used to waive or modify the terms or requirements of the zoning ordinance.

6-5-5 VARIANCE. Any person or entity desiring a waiver or modification of the requirements of the zoning ordinance as applied to a parcel of property that he/she owns, leases, or in which he/she holds some other beneficial interest may apply to the Board of Adjustment for a variance from the terms of the zoning ordinance.

6-5-6 STANDARDS.

A. The Board of Adjustment may grant a variance only if each of the following conditions are met:

1. Literal enforcement of the zoning ordinance would cause an unreasonable hardship for the applicant that is not necessary to carry out the general purpose of the zoning ordinance;

2. There are special circumstances attached to the property that do not generally apply to other properties in the same district;

3. Granting the variance is essential to the enjoyment of a substantial property right possessed by other property in the same district;

4. The variance will not substantially affect the general plan and will not be contrary to the public interest; and

5. The spirit of the zoning ordinance is observed and substantial justice done.

B. In determining whether or not enforcement of the zoning ordinance would cause unreasonable hardship under subsection A, above, the Board of Adjustment may not find an unreasonable hardship unless the alleged hardship:

1. Is located on or associated with the property for which the variance is sought; and

2. Comes from circumstances peculiar to the property, not from conditions that are general to the neighborhood.

C. In determining whether or not enforcement of the zoning ordinance would cause unreasonable hardship under subsection A, above, the Board of Adjustment may not find an unreasonable hardship if the hardship is self-imposed or economic.

D. In determining whether or not there are special circumstances attached to the property under subsection A, above, the Board of Adjustment may find that special circumstances exist only if the special circumstances:

1. Relate to the hardship complained of; and

2. Deprive the property of privileges granted to other properties in the same district.

E. The applicant shall bear the burden of proving all of the conditions justifying a variance have been met.

F. Variances run with the land.

G. The Board of Adjustment and any other body may not grant use variances.

H. In granting a variance, the Board of Adjustment may impose additional requirements on the applicant that will:

1. Mitigate any harmful affects of the variance; or

2. Serve the purpose of the standard or requirement that is waived or modified.

6-5-7 BUILDING PERMITS. The Building Official shall not issue any building permit for any building, construction or repair of any building unless such fully conforms to all zoning regulations or ordinances of this municipality in effect at the time of application. No permit shall issue for any building or structure or part thereof on any land located between the mapped lines of any street as shown on any official street map adopted by the governing body.

6-5-8 NOTICE TO COUNCIL OF VARIANCE OR BUILDING PERMIT APPLICATION. Before any application for a variance or building permit is heard by the Board of Adjustment, the Board of Adjustment shall give Fillmore City at least fifteen (15) days notice of any hearing to consider the application.

6-5-9 ZONE BOUNDARY ADJUSTMENT. Where a zone boundary line divides a lot in a single ownership at the time of the passage of this chapter, the Board may permit a use authorized on either portion of such lot to extend not more than fifty feet (50') into the other portion of the lot.

ZONE STANDARDS –Office Residential District

Type	Allowed	Administrative Conditional Use	Conditional Use	Business License
Office, Business, Gov	✓			
Office, Professional	✓			✓
Outdoor Rec-Park-Play	✓			✓
Personal Services	✓			✓
Preschools		✓		✓
Public Services			✓	
Public Rights-of-Way	✓			
Repair Services, Small App	✓			✓
Schools, Private	✓			✓
Schools, Public	✓			
Stable, private	✓			
Subdivisions			✓	
Temporary Outdoor Use		✓		✓

6-7-8.3 DEVELOPMENT STANDARDS

Table 6-7-8 .3 Minimum Lot and Development Standards

		Area	Width	Setbacks	Height	Sidewalks
LOT	**Single Family Dwelling**	7, 500sf	75'	**Front:** 25' **Side:** 8' **Rear:** 20' **Accessory Structure:** 25' Front/ 3' Side	35'	Yes **Single Family /Owner Occupied New Construction Only:** Any portion of sidewalk required over 150' is eligible to participate in the Fillmore City cost sharing program for the construction of that portion of the sidewalk
	Two Family Dwelling	9,000 sf	90'	**Front:** 25' **Side:** 8' **Rear:** 20' **Accessory Structure:** 25' Front/ 3' Side	35'	Yes
	Commercial	7, 500sf	90'	**Front:** 25' **Side:** 8' **Rear:** 20' **Accessory Structure:** 25' Front / 3' Side	35'	Yes

1. Erection of more than one principal structure on the lot.

More than one structure housing a permitted principal use, may be erected on a single lot provided that yard setbacks and other requirements of this ordinance shall be met for each structure.

2. Structure to have access.

All structures shall be on a lot adjacent to a public street or with access to an approved private street, and shall be so located on lots as to provide safe and convenient access for fire protection.

3. Farm Animals/Livestock. Livestock, fowl and other animals (excluding household pets) that may, where permitted, be kept, bred and maintained with the following restrictions:

a. Livestock. One animal for every 5,000 sq ft of property, (excluding occupied structures) one horse, cow, pig, llama, goat or (5) sheep. Unaltered male goats are not allowed other than on a temporary basis for breeding purposes. The offspring of livestock may be kept without consideration of the space limitations until the animal is weaned or not to exceed 6 months.

b. Other farm animals. For each 5000 sq ft of property, (excluding occupied structures) five rabbit or fowl or other similar small animals may be kept. 100 rabbits or fowl may be kept in an enclosed structure with a roof and walls on all sides. The offspring kept in the enclosed structure shall not exceed 200 and may be kept for a period of 6 months. One enclosed structure maybe kept for every 5,000 sq ft of property (excluding occupied structures).

c. Animals stabled or housed in enclosed areas. Any building, structure or corral in which livestock is kept must be at least 50 feet from any street, dwelling, or sidewalk. This restriction does not include open pasturing on a temporary or seasonal basis.

6-7-8.4 Fencing

Table 6-7-8.4 Fencing

Clear Vision Restriction	Setbacks	Height	Wildlife/ Large Animal	Electric	Corner Lot
25'	Front: 3' Side: 3' Exception: 25' Front for electric fence	Front: 4' Side: 6' Rear: 6'	Administrative Conditional Use	Administrative Conditional Use	Administrative Conditional Use

6-7-8.5 PERFORMANCE STANDARDS: The operation of any use permitted in this district is subject to the following standards of performance:

1. All uses must be operated so that all practical means are used to confine any noise, odor, dust, smoke, vibration or other similar feature to the premises upon which they are located.

2. Any light used to illuminate signs, parking areas, or for any other purpose shall be so arranged as to confine direct light beams to the lighted property by appropriate directional hooding.

6-7-8.6 PARKING: Parking standards in Section 6-7.10. Parking, also apply to the following on-site parking requirements:

Table 6-7-8.6 Parking

USES	PARKING REQUIREMENT
Apartment House	3 spaces per 1,000 square feet
Group Home	The greater of: 1 space per 2 bedrooms plus 1 space per employee per shift, or 2 per 3 employees per shift
Child Care Facility/Center	1 space per on-duty employee and 1 per 6 children
Dwelling, Single Family	2.5 spaces per Dwelling Unit (min. 167 sf per space)

ADDENDUM 2
TRANSCRIPT OF HEARING BEFORE THE BOARD OF ADJUSTMENT

FILLMORE CITY
BOARD OF ADJUSTMENT
July 31, 2008

TRANSCRIPT OF THE PROCEEDINGS

Present:

Chair: Eric Larsen	Wendell Robison
Zoning Adm: Lisa Crosland	Marty Lunt
Secretary: Teresa Alldredge	Debra Jackson
	Josephine Huntsman

Others: Larry Peterson, Lee Day, Attorney James Slavens, Thad Stevens

Counter 001 Time 7:05 p.m. July 31, 2008

Eric Larsen: Ok, We are convening this Board of Adjustment tonight to hear the appeal for a variance by Thad Stevens, a.... the reason for the Appeal it says is the definition of quote "structure" and the denial of the permit. And so we will begin by hearing from Mr. Slavens or Thad, whichever.. ok ..if you would like to come up to the, whatever that is, podium.

James K. Slavens: Thank you, a.. I think the appeal may be a little big broader than that. a... the.. let me kind of explain why I think that... the.. well, just as a little background why this is before you folks, Thad has purchased a glorified "umbrella" I use that term because it best fits the position I am trying to take.. It was something that was sold locally, he bought it, secured it to his driveway that functions as a shade for his vehicle. I am going to pass these pictures around so you can kinda see what I am talking about. While that is being passed around, the development standards regarding the zoning requirements indicate you cannot have a structure within 25 feet of the front of the property. This a.. this metal shade goes within that period of time, so I think it kinda hinges on what "structure" means, because what the zoning requirements say that you can't have a structure within 25 feet, so I think the first determination is whether or not this thing qualifies as a structure as defined in the definitions. Chapter 6-2 defines structure as the following:

" anything constructed, (comma) the use of which requires a fixed location on or in the ground or attached to something having a fixed location on or in the ground " I think it fits that part of the definition... then it says..." and which imposes an impervious material on or above the ground;(semi colon) definition includes "building".

So I understand on structure you gotta know what "impervious" means and I (inaudible) and I didn't know what impervious means and I don't know that I still do, or whether I do now. I did look up impervious in the dictionary in Marion Webster's Dictionary on line, and it defines it as " not allowing entrance or passage; impenetrable. I don't think this a.... metal ... a.....structure fits that definition of structure – it's not – you can walk right through it. And as you can see we have Thad in his truck there and you can see, you can see through the structure the view's not obstructed as far as the sidewalk and streets are concerned. So that's the reason we don't think that .. that...metal umbrella fits the definition of the a "structure".

Impenetrable – I looked that word up in the dictionary as well and it means "incapable of being penetrated or pierced", I don't think... you can walk right through it...you can walk from one side to the other side, the outside to the outside other side without, a.. I mean there is a way to do it, which is different from a building. I think the definition of the word structure uses the building as kind of an example of what it talks about – a building is something that we have here, where you go through a door where you get through the building. There is no, I mean, its not enclosed all the way around . A... so that's the reason that we think this should not be defined as a structure as it has been applied and that restriction of being within 25 feet . That's the first aspect of why we think that we should be allowed a building permit.

The second aspect is the variance of Chapter 6-5 gives a criteria of when a variance should be a... allowed.. a the first criteria .. it says each of the following, so each of these criteria have to be reached to be able to meet the variance.

The first one is basically an "unreasonable hardship" and if you look at the property there in those pictures, his house goes within two feet from the property line and 5 feet on the other side. So, this is the only way that he could have someway to protect his vehicle from the elements, so I think it would impose unreasonable hardship, special circumstances is the same thing ....there is no place to put a garage...a... There is no place that would meet this criteria within 25 feet for him to have some sort of protection against his vehicles.

It is essential to the enjoyment of his property – again the same thing... a..he wants to be able to protect his vehicle from the weather and he needs that to be able to ..a.... protect his vehicles from snow, rain, and other things that may do damage to his vehicle..a...the fourth one is that is will not substantially affect the general plan.. if you look at that..that on first (inaudible) it may look like criteria could not be met but he is willing to take that fence down so that would actually increase... so that he could see down that road....I think there is a general interest in protecting people that are walking down the sidewalk from people that are backing up and he is wiling to take that fence down so that he can keep the

shelter for his vehicle. a... and then the spirit of the zoning ordinance is observed and substantial justice is done for the same reasons I have already articulated I

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think that would be justice.. he has already purchased this, he didn't know anything about the restrictions when he put that up, and so that if you can find that it does meet the definition of structure, he has to have a variance (inaudible) the shelter there. He has gone to quite a bit of expense purchasing it and making sure that the wind or something didn't cause it to blow off and to cause property damage. We have it looked at from Sunrise, someone ..... who came over and looked at it? ...

Thad Stevens: He told me that

James K. Slavens: Jason, right. Jason came and - the building inspector checked the specs that came with it to make sure that it would stand, of course you know we have had some pretty tough wind storms the last little bit and it .. hasn't been any problems. So I think there is no safety issues that have to be concerned. It is bolted down tightly so there can't be blown or cause damage to other structure... it is bolted down...

I could answer any questions that you may have about our position.

Eric Larsen: Are there any questions for Mr....

(pictures are passed around)

Debbie Jackson: Is this a garage?

James K. Slaves: No... Yes..

Debbie Jackson: Is it part of the house?

Thad Stevens: Yes, and there is also a variance given on that garage and there is a patio across the home and a variance on that one.

Debbie Jackson: so the part that is close to the property line, is it a garage?

Thad Stevens: uh huh. Yes. But my truck is a one ton and that garage has a real low door and there is no way that I can drive the truck in there.

(inaudible)

Wendell Robison: Now if I understand, the carport was installed after the City ordinance of 25 feet had been enacted. Is that correct?

James K. Slavens: I don't think so.... That is how is has always been.(turned to zoning administrator for response)

Lisa Crosland: The structure was installed after the ordinance was in effect, yes.

Wendell Robison; And you are claiming that it is not a structure because it is moveable?

James K. Slavens: No, I think it does meet the first part of the definition, I think there are two parts to the definition and I think the first one is, the first part of that is that it is a fixed location on or in the ground, or is attached to something having a fixed location on the ground, it is attached to the concrete there, so I think it is attached – it would have to be attached or it would blow away. I think the part that it does not meet is the second part of that is imposes impervious material, and I think that the fact that if you put that picture, you can just walk right through it, and it is not impervious.

Marty Lunt: Is the top impervious?

James K. Slavens: the top would be. Yes.

Marty Lunt; So is that part of the structure?

James K. Slavens: be part of it, yes.

Marty Lunt: So the first part is a structure, and the second part is a structure.

James K. Slavens: No, I think you have to look at it as a whole. I mean, it is the whole function of the unit. I think you have to look at the function of the unit.

Marty Lunt. So if you are saying the first part is a structure, I don't understand how you are saying the second part isn't part of the structure.

James K. Slavens: ok, I guess the best way to ask the question is when would that ever become important then? because, I mean, you would just have air there. If you didn't have something that is impervious, you would just have air there, you would have nothing. So you wouldn't need the word impervious.

Marty Lunt – right, (inaudible) so would you say it is a structure?

James K. Slavens: I don't. I think you can use the word structure to describe it, I think even when I was talking I talked about a structure, but to me it is more of a shelter, it's more of... the fact that it is impervious

Marty Lunt – so did you say that it is bolted down

James K. Slavens: It is. So, if you look at both parts of the definition, and it said and, it didn't say or, ah, so I think both parts of that have to be met to qualify as a structure.

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Debbie Jackson: It sure sounds impervious to me. It says – (inaudible) impervious material on or above the ground – impervious is above the ground – it entirely meets the definition, if that is the discussion I gather (inaudible)

James K. Slavens: There's. I just.... One of the a... in the law, one of the things they use for statutory interpretation is you have to give meaning for the definition, and, a... if, when would you have any material there that you'd even be discussing structure if it didn't mean the whole thing, that you couldn't walk through the thing?a....

Wendell Robison: But walking through it is not the only thing that you would qualify for impervious.

James K. Slavens: the only thing that I can see in case law would be mines. They say that mines are not...if water can go through the mines then it is not impervious, but you have to have something there to determine, I mean, otherwise how would you ever discuss whether it is impervious? There would have to be nothing there for pervious to ever become important.

Eric Larsen: We are not talking about impervious everything. We are talking about impervious material, and steel is an impervious material.

James K. Slavens – yeah, I am not doing a very good – let me at least get to the comfort that I , you know what I am trying to say, and I am not doing a very good job of it, The only time you would even discuss whether ...there would have to be some material there – unless I don' t know a net, I guess if there were a net there would that ....then.. I don't know if you would ever have to discuss with a net – if you went up there and cut little holes in the roof that would make it impervious?

Eric Larsen – No, we are talking about impervious material. Material used it can be made of swiss cheese, if the material is impervious, it would qualify as impervious, it doesn't matter how many holes, open windows, or open doors you have, it is a structure by definition, as I read it, which is made out of impervious

material – and that could be wood, that could be glass, or that could be plexiglas, plastic .. the material that is used is impervious, it doesn't mean that it is totally secure and a bunker and a bullet proof or anything like that.

James K. Slavens – so the awnings over the porch would be a violation? (inaudible)

Eric Larsen - And I guess we won't be the first ones to deny that there has been a mistake in the past but we have to stop somewhere and say we have got to deal with what we have got.

James K. Slavens: Based on that, I think, (laughs) I think that the main thing we want to argue is that a variance (inaudible) you meet characteristics of the house itself and property itself justifies a variance and he is willing to address any concerns that you folks may have about the safety issues (inaudible - fence) I can see that being a real safety issue, concern to you folks and he is willing to take that down and do something with that fence so that any concerns that way would be satisfied.

Eric Larsen: Ok, a.. the criteria that we operate under is by statute granted to the City by the State of Utah, and they also impose upon us as a body, as a board, that there are five criteria, and if any one of those is in question, no variance can be granted. So let's look at those one by one.

Literal enforcement of the zoning ordinance would cause an unreasonable hardship for the applicant that is not necessary to carry out the purpose of the zoning – general purpose of the zoning ordinance - so then we have to look at what the zoning ordinance is all about. Why do they have the 25 foot setback? And again, those,a.. that part of the ordinance is granted to the state – granted to the City by the State, in fact I believe it is recommended that everyone in residential areas have 25 foot setbacks, I might be wrong, but I believe that is the case. So we have to look at the general purpose of the zoning ordinance and why it is there, and sure it is the health, safety, and welfare of the community.

Debbie Jackson: May I say something?

Eric Larsen: Yes.

Debbie Jackson: We are talking about the 25 foot setback, but there is also an 8 foot side setback and this has a three foot, and you mention that when the home was built, that was allowed at the time, but I think that is a real issue too if you are talking about setbacks, there isn't the 8 feet to the side as well, and that aggravates that in addition I think.

Eric Larsen: Ok. So there is the two issues, both of them are set back one from the front and one from the side. We will come back and go through all these again.

There are special circumstances attached to the property that do not generally apply to other properties in the same district. That would be things that would be unique about the property. Uh.. hillsides that apply to that property only and no body else around there, or, a utility underground pipe of some kind that would cause shifting of the house from one side of the property to the other, that no one else would have in that particular area. It has to be something unique about the property that zoning that is applied in that general area, the uniqueness of that piece or property has to be unique, one of a kind. A.... and based on the footages that I saw here that was 78' frontage, looks like more on the south end, I think there are other properties in that area that are probably about that same size or even smaller, so the uniqueness, I don't see anything unique or someone else can point that out to me.

Number three: Granting the variance is substantial to the enjoyment of a substantial property right observed by other property in the same district. Well, if we granted this structure to remain, a... violating the zoning ordinance, then we would have to open it up to everybody, and we would come up with all kinds of impervious materials to deal with...a..

Number four: the variance will not substantially affect the general plan and will not be contrary to the public interest. The twenty five foot setback is in the public interest, it's one of those things that they have had allowed zoning to continue because it affects the health, safety and welfare of the community. Property values are affected when people start to encroach clear out to the public sidewalk, it's allowed in the business district, but the beauties of the residential area can be blurred quite a bit by encroaching on that area, besides the safety aspect.

And number five is spirit of the zoning ordinance is observed and substantial justice is done. When you look at all five of those, I have a hard time seeing that it qualifies for any of the five, based on what my understanding about the zoning laws and the uniqueness of the property and what you have built there and the hardship, you know I mean, the law says you either knew or should have known that there were zoning laws, it was published a long time ago and you can't ..it makes it difficult when the City has to try to send a letter to everybody anticipating that they are going to start building something because they never know. That is what the law says....it was either known, or should have been known. It is not the City's responsibility to make sure that everyone has that mailed to them every time they are thinking of building something.

Is there any other comments or? Wendell?

Wendell Robinson: I think you have done an excellent job on the presentation. It has been understandable. I just have one clarification that I need made though, and that's in regarding the structure on the property. To me it really doesn't matter whether it is impervious or not, that just might be an item that was in one of the regulation as and we expanded on it, quite a bit, but I think that it boils down to the real issue uncovering everything else is does it meet the 25 foot setback, and to me I think I need things just as simple as they can be., and to me that is the crux of the program here.

Judy Huntsman: I have a question. When you got the variance for the house was that under a non-conforming variance?

Eric Larsen: How long ago was that variance?

Thad Stevens: A……about '83.

Judy Huntsman: If it was a non-conforming variance you can't add anything else into that variance. (inaudible)

James K. Slavens: I do. I think that would be true if you want to build closer to that property line, it just affects that variance.

Judy Huntsman: You can't add anything to a non-conforming variance.

James K. Slavens: That's just not my..my understanding is that you can have more than one variance on a property for different ordinances. You just can't get a variance and add things to that. You see that variance was just within the property line...on that...on that

Judy Huntsman: It looks like it was not attached to your house, (inaudible) I couldn't tell...

Eric Larsen: Ok, any other questions?

Marty Lunt: I think is a nice structure (inaudible) setback issue (inaudible) probably nice like you said to keep your truck sheltered and stuff like that, but. We have to follow the rules, I guess (inaudible)

Thad Stevens: If there is a safety hazard involved it is that fence, not the carport.

James K. Slavens: I think, the thing, that I think differentiates this is the fact that you can see through it, I mean, a... that it is an umbrella, and I can see .. a.. I don't think it distracts from the neighborhood, a...

Eric Larsen: That is your opinion though... thats

James K. Slavens: I see a lot over here that just really bothers me, I mean I think normal standards, it's well made, its not some 2x4, 3 or 4 2x4's hooked together and a piece of plywood, so there is nothing, there is nothing obnoxious about this structure itself and I think the thing that takes it out of that structure definition is if you look at, I mean, the typical meaning of structure is, you know a house, an out building, something that has doors and windows you can't walk through you can't see through, and this you can see through almost as well as if it weren't there, and so I think the uniqueness aspect of it isn't limited to a.... the property itself, the physical characteristics of the property, I think the way it has been developed can also make it unique and so I think this is a unique a... piece of property by the way it is built, so I don't think that uniqueness is limited to just the natural characteristics of the property, I think you know.. what we have talked about... I think that the way it has been developed is also unique.

Counter # 162

Eric Larsen: The uniqueness of it though is not something that we look at in terms of the way it was developed, it has to be for us to grant it, it has to be unique to that property because of certain conditions, like a steep hillside, like a utility line, like an odd piece shaped of property. There is nothing odd about it. That's the criteria that we have to go on.

James K. Slavens: And I respectfully disagree with that. I understand that this is your opinion,

Eric Larsen: That is not my opinion, it is state code. The guidelines that were given by the state.

James K. Slavens: Do you have a cite on that? 'cause that's not the way I read it. I mean it's, I don't think uniqueness has to be a natural thing.

Eric Larsen: All the trainings that I have gone to that have been put on by the State, that is what they have said, and so...So, we have heard the argument let me go through these one by one I will ask for a motion on each one of these:

#1 Literal enforcement of the zoning ordinance would cause an unreasonable hardship for the applicant that is not necessary to carry out the general purpose of the zoning ordinance. I need a motion whether or not that would pass or fail.

Marty Lunt: Move to fail.

Eric Larsen: Marty has made the motion that it fails, all in favor say aye:

(Audible response is a collective AYE) Any opposed (no response)

Number two: **#2 There are special circumstances attached to the property that do not generally apply to other properties in the same district** – I would accept a motion on that.

Wendell Robison: I make a motion that it does not.

Eric Larsen: Wendell has made the motion that it does not. I guess I need a second to that motion.

Debbie Jackson: Second.

Eric Larsen: Debbie seconds it. I probably should back up, and did we get a second to the first motion? on number one?

Wendell Robison: Second

Eric Larsen: Wendell seconds that one. **Debbie seconded number two. All in favor say aye (audible response is a collective AYE)**

Number three: **#3 Granting the variance is essential to the enjoyment of a substantial property right possessed by other properties in the same district**.

I would accept a motion on Item #3.

Wendell Robison: I would move that there is no special arrangement that would interfere with the enjoyment of property.

Eric Larsen: ok. Wendell has made that motion. Is there a second.

Marty Lunt: Second:

Eric Larsen: Marty has seconded. Any questions? **All in favor say "aye". (audible response is a collective AYE) any opposed? (no response)**

Number four: **#4 The variance will not substantially affect the general plan and will not be contrary to the public interest.** I would accept a motion on number four. ....pause...getting bored of making motions? **I will make the motion that this also be denied. Is there a second to that motion?**

Wendell Robison: Second.

Eric Larsen: **Wendell has seconded. Any questions? All in favor say aye. (audible response is a collective AYE) Any opposed? (No response)**

And number five **#5 – The spirit of the zoning ordinance is observed and substantial justice is done. I need a motion for that one.**

Wendell Robison: So be it.

Eric Larsen: Which "so be it way do you want to vote:

Wendell Robison: That it does not exceed the criteria (inaudible)

Eric Larsen: Ok, is there a second to that motion?

Judy Huntsman; Second

Eric Larsen: Judy has seconded. Any questions? All in favor say "aye" (audible response is a collective AYE) any opposed (no response) Motion carried.

Counter number 181

Eric Larsen: It just doesn't look like the structure thing is going to do it, or the variance either.

James K. Slavens: I think it would be appropriate to get a vote on the definition of structure.

Eric Larsen: OK. a.. There has also been the questions raised about the definition of structure and I will read the definition again.

> "anything constructed the use of which requires a fixed location on or in the ground or attached to something having a fixed location on the ground, and which imposes an impervious material on or above the ground "

Does anyone feel that the structure that has been constructed at Mr. Steven's does not apply to that definition? Is that a motion Wendell?

Wendell Robison: I would make a motion that it is a permanent fixture attached to the ground made of impervious material.

Eric Larsen: Is there a second to that motion?

Judy Huntsman: Second.

Eric Larsen: Judy has seconded. Any other questions? All in favor say "Aye" (audible response a collective AYE)

Thank you. This meeting is adjourned.

ADDENDUM 3
DISTRICT COURT'S RULING ON PETITION FOR JUDICIAL REVIEW

IN THE FOURTH JUDICIAL DISTRICT COURT
MILLARD COUNTY, STATE OF UTAH

THAD STEVENS, Petitioner, v. FILLMORE CITY, Respondent.	**RULING ON PETITIONER'S PETITION FOR JUDICIAL REVIEW** Case No. 080700143 Judge Donald Eyre, Jr.

Petitioner Thad Stevens filed a Petition for Judicial Review with the Court on August 27, 2008 based on a hearing held in front of the Fillmore City Board of Adjustment on July 31, 2008. Respondent Fillmore City filed a response on October 6, 2008. The Court held a review hearing on April 13, 2009, during which it instructed the parties to prepare memoranda on the matter. Petitioner filed his memorandum of law on April 28, and Respondent filed an opposing memorandum on May 5, 2009. Petitioner filed a reply memorandum in support of his petition on May 14, 2009.

STATEMENT OF FACTS

This petition stems from a dispute over a metal covering (also referred to by the parties as a "carport" or "canopy") installed on Petitioner's driveway in Fillmore sometime prior to April 2008. Petitioner apparently installed the covering to protect his vehicle from adverse weather conditions. The covering is secured to the concrete ground and extends to a point less than 25 feet from the front of the property line.

On or about April 16, 2008, Petitioner was served notice by the Fillmore City Building Inspector indicating that the covering violated a Fillmore City zoning ordinance requiring all structures on a residential property to be set back at least 25 feet from the front property line. Petitioner appealed the decision before the Board of Adjustment ("the Board") at a hearing on July 31, 2008, arguing that he was entitled to a variance. The Board, after some discussion, denied the appeal and adjourned the hearing.

ISSUES AND LEGAL STANDARD

Petitioner argues here that he is entitled to judicial review of the board's decision based on a disagreement with the Board's interpretation of certain ordinance definitions as well as a due process argument.

The Court may review the Board's decision subject to the restraints found in the Fillmore Municipal Code as well as the Utah Code.

The Fillmore City Municipal Code § 6-5-11 states:

> Any person adversely affected by any decision of the Board of Adjustment may petition the district court for a review of the decision. In the petition, the plaintiff may only allege that the Board of Adjustment's decision was arbitrary, capricious, or illegal.

The review standard is further elucidated by Utah Code Annotated § 10-9a-801, which states, in relevant part:

> (2) (a) Any person adversely affected by a final decision made in the exercise of or in violation of the provisions of this chapter may file a petition for review of the decision with the district court within 30 days after the local land use decision is final.
>
> ...
>
> (3) (a) The courts shall:
>
> (i) presume that a decision, ordinance, or regulation made under the authority of this chapter is valid; and
>
> (ii) determine only whether or not the decision, ordinance, or regulation is arbitrary, capricious, or illegal.
>
> (b) A decision, ordinance, or regulation involving the exercise of legislative discretion is valid if it is reasonably debatable that the decision, ordinance, or regulation promotes the purposes of this chapter and is not otherwise illegal.
>
> (c) A final decision of a land use authority or an appeal authority is valid if the decision is supported by substantial evidence in the record and is not arbitrary, capricious, or illegal.
>
> (d) A determination of illegality requires a determination that the decision, ordinance, or regulation violates a law, statute, or ordinance in effect at the time the decision was made or the ordinance or regulation adopted.
>
> ...
>
> (7) (a) The land use authority or appeal authority, as the case may be, shall transmit to the reviewing court the record of its proceedings, including its minutes, findings, orders, and, if available, a true and correct transcript of its proceedings.
>
> (b) If the proceeding was tape recorded, a transcript of that tape recording is a true and correct transcript for purposes of this Subsection (7).
>
> (8) (a) (i) If there is a record, the district court's review is limited to the record provided by the land use authority or appeal authority, as the case may be.
>
> (ii) The court may not accept or consider any evidence outside the record of the land use authority or appeal authority, as the case may be, unless that evidence was offered to the land use authority or appeal authority, respectively, and the court determines that it was improperly excluded.

ANALYSIS

Petitioner first argues in his petition that the Board's decision was arbitrary or capricious because the covering installed on his driveway was not a "structure" as defined by the Fillmore Municipal Code.

Fillmore Municipal Code 6-7-8.3 states:

Accessory structures must be set back 25 feet from the front property line and 3 feet

from the side property line, unless attached and then set back 8 feet from the side property line.

The word "structure" is defined in the Municipal Code § 6-2 as follows:

Anything constructed, the use of which requires a fixed location on or in the ground, or attached to something having a fixed location on the ground and which imposes an impervious material on or above the ground; definition includes "Building."

The word "building" is defined in the Municipal Code § 6-2 as:

Any structure, whether temporary or permanent, having a roof, and used or built for the shelter or enclosure of persons, animals, possessions, or property of any kind.

Petitioner contends that the covering in his driveway meets neither the definition of structure or building as found in the Municipal Code.

Petitioner correctly notes that the Municipal Code definitions of building and structure appear to include the respective terms in their own definitions, which presents some confusion. However, the intent of the Municipal Code's drafters can be discerned by focusing on the other language in the definitions.

The Court first considers the definition of the word structure in the Municipal Code. Clearly Petitioner's covering is something constructed which requires and is attached to a fixed location on the ground and imposes a material of some kind on or above the ground. The main dispute is over whether the material imposed is impervious. Petitioner claims, citing Webster's Dictionary, that impervious requires something "not allowing entrance or passage." Since the covering itself does allow passage of a car or person through it, Petitioner argues that it is not impervious.

The Board, in its decision, focused not on whether the covering itself was impervious, but whether it was composed of an impervious material. During the July 31 hearing, board member Eric Larsen said: "We are not talking about impervious everything. We are talking about impervious material, and steel is an impervious material. . . . Material used it can be made of swiss cheese, if the material is impervious, it would qualify as impervious, it doesn't matter how many holes, open windows, or open doors you have, it is a structure by definition, as I read it, which is made out of impervious material – and that could be wood, that could be glass, or that could be plexiglass, plastic..." (Transcript of July 31, 2008 Hearing ("Transcript"), lns. 205-06, 216-21.) At the end of the hearing, at Petitioner's counsel's request, the Board voted unanimously that the definition of structure in the Municipal Code is "a permanent fixture attached to the ground made of impervious material." (Transcript, lns. 485-93.)

In reviewing the decision of the Board on this point and all other points, the Court may not base its findings on whether or not it agrees with the Board's decision. The Court, in fact, must initially "presume that a decision, ordinance, or regulation made under the authority of this chapter is valid." Utah Code Ann. § 10-9a-801(3)(a)(i). The Court may only decide the Board's decision is not valid if it is not supported by substantial evidence in the record, or it was arbitrary, capricious, or illegal. *Id.* § 10-9a-801(3)(c). Substantial evidence is defined under Utah law as "that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." *First Nat'l Bank of Boston v. County Bd. of Equalization*, 799 P.2d 1163, 1165 (Utah 1990).

The Utah Supreme Court has held that a district court may find a decision of a Board of Adjustment arbitrary or capricious only if the decision was "so unreasonable" as to be labeled as such. *Xanthos v. Board of Adjustment of Salt Lake City*, 685 P.2d 1032, 1035 (1984). "It does not lie within the prerogative of the trial court to substitute its judgment for that of the Board where the

record discloses a reasonable basis for the Board's decision." *Id.* "Indeed, municipal land use decisions as a whole are generally entitled to a 'great deal of deference.'" *Bradley v. Payson City Corp.*, 2003 UT 16, ¶ 10, 70 P.3d 47 (internal citation omitted).

Having reviewed the record and the transcript of the proceedings, the Court finds here that the Board's interpretation of the definition of a structure was reasonable, and therefore not arbitrary or capricious. There is likewise substantial evidence in the record to support the Board's conclusion. While Petitioner is correct that the entire covering is not impervious, the Municipal Code requires only an imposition of an impervious *material*. As the Municipal Code does not further define the term, the Board reached a reasonable conclusion that the covering imposed such a material on or above the ground.

The Board's finding might also be substantiated by the description found in the definition of the word building in the Municipal Code. Petitioner's driveway covering has a roof and is used for the shelter of "possessions or property," i.e. his vehicle. Petitioner specifically expressed in the July 31 hearing that the purpose of the covering was to "protect his vehicles from snow, rain, and other things that may do damage to his vehicle." (Transcript, lns. 81-82.) Petitioner's covering therefore fits all the requirements of a building other than, arguably, whether or not it is a structure.

Petitioner next argues that even if the covering fits the definition of structure, he is nevertheless entitled to a variance. The requirements for a variance are set out in Utah Code Annotated § 10-9a-702:

> (2) (a) The appeal authority may grant a variance only if:
>
> (i) literal enforcement of the ordinance would cause an unreasonable hardship for the applicant that is not necessary to carry out the general purpose of the land use ordinances;
>
> (ii) there are special circumstances attached to the property that do not generally apply to other properties in the same zone;
>
> (iii) granting the variance is essential to the enjoyment of a substantial property right possessed by other property in the same zone;
>
> (iv) the variance will not substantially affect the general plan and will not be contrary to the public interest; and
>
> (v) the spirit of the land use ordinance is observed and substantial justice done.

See also Fillmore Municipal Code § 6-5-6.

Again, the Court may only overturn the Board's denial of a variance if it finds that the decision was so unreasonable as to be arbitrary or capricious. In reviewing the transcript of the July 31 hearing, the Court finds that the Board considered each of the variance factors and reasonably concluded that they did not apply.

The Board found at the hearing that the 25-foot ordinance was created for the "health, safety, and welfare of the community." (Transcript, lns. 251-52.) Allowing Petitioner's covering, the Board found, would not satisfy the first variance requirement, as Petitioner made no showing that it would impose an unreasonable hardship that was not necessary to carry out this purpose.

The Board also found that the second requirement of special circumstances was not satisfied. Eric Larsen said at the hearing: "It has to be something unique about the property that zoning that is applied in that general area, the uniqueness of that piece or property has to be unique, one of a kind." (Transcript, lns.. 273-75.) This finding is in harmony with the Utah Supreme Court's interpretation of the variance statute: "It is not enough to show that the property for which the

variance is requested is different in some way from the property surrounding it. Each piece of property is unique. What must be shown by the applicant for the variance is that the property itself contains some special circumstance that relates to the hardship complained of and that granting a variance to take this into account would not substantially affect the zoning plan." *Xanthos v. Board of Adjustment of Salt Lake City*, 685 P.2d 1032, 1036 (1984).

Third, the Board found that granting the variance was not substantial to the enjoyment of a substantial property right observed by other property. Eric Larsen stated: "Well, if we granted this structure to remain, a... violating the zoning ordinance, then we would have to open it up to everybody, and we would come up with all kinds of impervious materials to deal with." (Transcript, lns. 282-85.)

Fourth, the Board found that the variance would be contrary to the public interest. Again quoting Eric Larsen: "The twenty five foot setback is in the public interest, it's one of those things that they have had allowed zoning to continue because it affects the health, safety and welfare of the community. Property values are affected when people start to encroach clear out to the public sidewalk..." (Transcript, lns. 288-92.)

Finally, the Board held that the fifth requirement did not apply. "[T]he law says you either knew or should have known that there were zoning laws, it was published a long time ago and you can't... it makes it difficult when the City has to try to send a letter to everybody anticipating that they are going to start building something because they never know." (Transcript, lns. 300-04.)

The Court finds that the Board had a reasonable basis for each of these decisions, and explained its reasoning before voting unanimously on them to deny the variance. "[I]t is incumbent upon the party challenging the Board's findings or decision to marshal all of the evidence in support thereof and show that despite the supporting facts, and in light of conflicting or contradictory evidence, the findings and decision are not supported by substantial evidence." *Patterson v. Utah County Board of Adjustment*, 893 P.2d 602, 604 n.7. The Court finds that Petitioner has failed to make this showing.

Finally, Petitioner argues that his due process rights were violated by his inability to present evidence at the July 31 hearing. Petitioner argues that although he did not specifically state so in his original Petition, his position is that the Board's decision "was illegal because it amounted to a taking without just compensation." (Memorandum of Law in Support of Petition for Judicial Review ("Memo in Support"), at 6.) For the Board's decision to be considered illegal, Petitioner must show that it "violates a law, statute, or ordinance in effect at the time the decision was made or the ordinance or regulation adopted." Utah Code Ann. § 10-9a-801(3)(d).

Petitioner claims that "the Petitioner sought to introduce evidence to the Board of Adjustment concerning the issue of a variance; however, Petitioner was denied any opportunity to do so... It was obvious that the Board was not interested in hearing any evidence. Petitioner desired to present evidence, but no meaningful opportunity was given." (Memo in Support, at 5.)

Due process at the administrative level requires only that a hearing be conducted at which an applicant is given the opportunity to present evidence and argument. "What this includes is an opportunity to present her cause, that is, her evidence and her contentions, to a tribunal vested with authority to make a determination thereon." *Peatross v. Board of Commissioners*, 555 P.2d 283 (Utah 1976). *See also McGrew v. Industrial Comm'n*, 85. P.2d 608 ("The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given.") (internal citation omitted).

The Court, reviewing the transcript of the July 31 hearing, finds that due process was not violated: that Petitioner was given sufficient opportunity to present evidence and argument, and that no evidence given was improperly excluded. Petitioner's counsel was given, at the outset of the hearing, a significant amount of time to explain his position, to present pictures of Petitioner's covering and the property, and to discuss each of the variance requirements. (Transcript, lns. 23-108.) In fact, none of the board members said anything until Petitioner's counsel requested that they ask questions. (Transcript, ln. 110). Further, after Eric Larsen explained the Board's reasoning concerning the variance requirements, Petitioner's counsel was given another opportunity to discuss his position and present additional argument and evidence in support of his request. (Transcript, lns. 329-386.) The Board voted on the variance only after all of these arguments were heard and Petitioner's evidence was presented. The transcript reveals no instance where Petitioner's counsel asked to present more evidence and was denied.

Because the Court finds that Petitioner has not shown that evidence was improperly excluded at the July 31 hearing, "[t]he court may not accept or consider any evidence outside the record." Utah Code Ann. § 10-9a-801(8)(a)(ii). Petitioner's request to present additional evidence to the Court is therefore denied.

CONCLUSION

Petitioner has failed to show that the Board of Adjustment's decision was not based on substantial evidence in the record or was arbitrary, capricious, or illegal. The Court therefore denies Petitioner's request for reconsideration of the decision.

Signed this 22nd day of June, 2009.

ORIGINAL IF IN RED INK
STATE OF UTAH
FOURTH DIST COURT • MILLARD COUNTY

DONALD J. EYRE
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that, on the 22 day of June, 2009, I caused a true and correct copy of the foregoing **RULING ON PETITIONER'S PETITION FOR JUDICIAL REVIEW** to be delivered to the following parties:

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